88-891

No. .....

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

DONALD L. HOLEMAN,

Petitioner,

v.

DIRECTOR, FEDERAL EMERGENCY MANAGEMENT AGENCY FOR THE NATIONAL FLOOD INSURANCE PROGRAM,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED[1]

1. Whether the doctrine of sovereign immunity bars Plaintiff's contention that the Federal Emergency Management Agency waived a contract requirement that Proof of Claim or Loss be sworn by the policyholder or his attorney.

2. Whether there was waiver in fact by the Federal Emergency Management Agency of a contract requirement that Proof of Claim or Loss be sworn by the policyholder or his attorney.

[1]The issues of deceptive trade practices and the Federal Tort Claims Act is not involved in this case, nor was it involved in the 5th Circuit. As a matter of fact, Petitioner asked to amend his pleadings in the trial court to eliminate any suggestion that these issues were sub judice and his motion to amend was denied.

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In The

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October Term, 1988

DONALD L. HOLEMAN,

Petitioner,

v.

DIRECTOR, FEDERAL EMERGENCY MANAGEMENT AGENCY FOR THE NATIONAL FLOOD INSURANCE PROGRAM,

Respondent[2].

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

[2]These are all of the parties involved in this proceeding. Supreme Court Rules 21.1(b) and 28.1.

OPINION BELOW

The judgment of the United States Court of Appeals for the 5th Circuit, dated August 31, 1988, which affirmed the judgment of the District Court, dated April 22, 1988, and which will not be reported, is included in Appendix A, infra, pp. A-1 & A-2. The Order of the District Court below granting Summary Judgment for the Defendant and the judgment of the District Court dated April 22, 1988, is included in Appendix B, infra, pp. B-1 to B-5, and is also unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on August 31, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND CONTRACTUAL PROVISIONS INVOLVED

The pertinent provisions of the statutes, 42 U.S.C. Sections 4053, 4071, 4072 and 4081 and the insurance contract are set forth in Appendix C, infra, pp. C-1 to C-11. Written waiver of right to bring suit on Petitioner's claimed losses dated September 18, 1986 is set forth in Appendix, D, Infra.

STATEMENT

1. **Background.**

The facts in this Government insurance case are simple uncontested and shocking.

The Government has refused to honor its insurance contract simply because Proof of Loss, although duly and timely filed, was not sworn or verified.

To reach this result, the trial court, and presumably the Fifth Circuit, relied upon *Federal Crop. Insurance Corporation v. Merrill*, 332 U.S. 380, a 1947 case from this Court. *Merrill* is continuously cited for Governmental Sovereignty in every imaginable circumstance as the plea of last resort when all other contentions fail. However, *Merrill* is distinguishable at every point on the compass, except that the Government, or one of its many creatures, is involved, in an insurance function, as in *Merrill*.

Unlike the estoppel argument advanced in *Merrill*, in an attempt to construct an insurance contract out of whole cloth, although violative of an existing regulation, this case does not suffer for lack of a substantive contract or a catastrophic flood which triggered the provisions of that contract. The issue in this case is whether there was waiver of any alleged procedural infirmity which might be said to bar recovery, including the failure to verify or swear to a properly filed proof of loss form.

In 1968, Congress expressly enacted law[3] in response to a perceived need to provide flood insurance which private carriers were unable to furnish because of the risk necessitating large premiums. In reliance on that law, and pursuant to extensive advertising touting the availability of Government insurance, Petitioner herein, and Plaintiff below, paid the asking premiums and acquired flood insurance from Respondent, Defendant below, covering four properties owned by him in the watershed area of the Big Wichita River, in Wichita Falls, Wichita County, Texas.

On June 5, 1985, it was determined by Respondent's Agents that these properties had a value of $82,652.00, exclusive of land values, and that the flood on that date caused damages to such properties in the amount of $42,995.01, thereby leaving a residual value of $39,646.99 after the flood. Respondent paid Petitioner the amount of the loss, less the contract deductibles. Petitioner signed Proof of Loss forms for his losses which were prepared, completed and witnessed by an adjuster on June 21, 1985, but they were not sworn.

Petitioner renewed his insurance policies with Respondent, and on or about June 10 1986, another flood inundated Petitioner's properties causing damages of catastrophic proportions. The same adjuster was dispatched as in 1985, but ignored Petitioner's request for Proof of Loss

[3] 42 U.S.C. Section 4001, et seq.

forms, as did Respondent itself, and Respondent declined to pay any damages until such forms were filed.

Under the urgent necessity of filing Proof of Loss within 60 days following loss, but lacking the official forms for doing so, Petitioner's counsel submitted on his letterhead a claim for loss based squarely upon the residuals remaining after the 1985 flood, to which all parties had agreed. This Proof of Loss was in the amount of $24,806.00, including personal property, a listing for which was also furnished. The agreed Proof of Loss forms for 1985 were specifically referenced, and, as stated, claim was made for an amount less than the residuals.

The foregoing submission was never directly acknowledged by the adjuster or by the Respondent which continued to insist upon the filing of Proof of Loss in a maddening sequence of events.

The summary judgment evidence by Respondent's witness affirmed that several on-site visits were made to the scene of the flood loss by the adjuster; a claims work up was sent to the Maryland office of Respondent for review; and, Petitioner's claims were deemed to be properly reported, but it was asserted that such claims were not properly supported with documentation of repair or replacement following the 1985 flood. (No claim was ever made for this, as stated).

Another affidavit submitted in support of summary judgment was given by a Ramsey Gray for Respondent who affirmed that he was an in-house adjuster with responsibility of follow-up reinspections which was carried out by him concerning Petitioner's properties, and he observed such properties were in a state of disrepair with sagging floors, leaking roofs and evidence of rot, decay and numerous floods over the past several years. He offered the opinion that the structures did not have a market value in excess of $5,000.00.

In summary, Petitioner claimed flood losses under his insurance policies in the amount of $24,806.00 based upon the

residuals remaining after the 1985 flood out of total insurance in force in the amount of $119,900.00. The summary judgment proof established the following damages:

Residuals following the 1985 flood	$39,646.99
Value after the 1986 flood	5,000.00
1986 True Loss based upon residuals only	$34,646.99

Initially, Petitioner's claims were denied because he did not establish by proof his repair or replacement of items damaged in the 1985 flood (His records were lost in the 1986 flood). When it became clear that Plaintiff was claiming nothing on that account, the technical defense was interposed that Petitioner did not file a sworn proof of loss, and this was the basis on which the trial court granted summary judgment for Respondent, affirmed without opinion by the Fifth Circuit.[4]

[4]Notice to the insurer of a theft or fire loss, or an accident under a liability policy, for example, is one thing. Time could be of the essence, and reasonable notice is important in order to afford the insurer time to investigate. The element of prejudice is clearly involved. See Liability Insurance in Texas: *Reasonable Time to give Notice or Forward Papers; Prejudice as a factor*, Randall E. Evans, 23 Baylor Law Review, page 419, et seq.

This sort of notice is not implicated here. Petitioner gave notice of the flood casualty immediately, which was notorious, in any event. The response of the adjuster was immediate; and there was full investigation by the adjuster and reinvestigation by Respondent.

The nature and sufficiency of the requirement of notice or Proof of Loss of damages, however, is something clearly separate and apart from notice of the event precipating a loss. This appears to be claim practice and the insurer generally is to be given the opportunity to address the position of a claimant before suit is filed.

2. **Relevant provisions of the insuring agreements and Regulations.**

The insuring agreements in the instant case provided in Article VIII, certain General Conditions and Provisions. Paragraph 1.4 of Article VIII states as a Requirement in Case of Loss:

> "4. Within 60 days after the loss, send us a proof of loss, which is your statement as to the amount you are claiming under the policy signed and sworn to by you."
>
> The relevant provisions then continue:
>
> "The insurance adjuster whom we hire to investigate your claim may furnish you with a proof of loss form, and she or he may help you to complete it. However, this is a matter of courtesy only, and you must still send us a proof of loss within 60 days after the loss even if the adjuster does not furnish the form or help you complete it. In completing the proof of loss you must use your own judgment concerning the amount of loss and the justification for that amount. The adjuster is not authorized to approve or disapprove claims or to tell you whether your claim will be approved by us.
>
> "5. We may, at our option, waive the requirement for the completion and filing of a Proof of Loss in certain cases in which event, you will be required to sign and at our option, swear to an adjuster's report of the loss which includes information about your loss and the damages needed by us in order to adjust your claim.
>
> "6. Any false statements made in the course of presentment of a claim under this policy may be punishable by fine or imprisonment under

applicable Federal Laws."[3]

The insuring Agreements, Article VIII Q, provide:

"Q. Conditions for filing lawsuit: You may not sue us to recover money under this policy unless you have complied with all the requirements of the policy. —"

Section 62.22, Judicial Review, of Subpart B of Regulations 44 CFR, Chapter 1 (10-1-85 Edition) states:

"(a) Upon the disallowance by the Federal Insurance Administration or the servicing agent of any claim on grounds **other than failure to file a proof of loss**, or upon the refusal of the claimant to accept the amount allowed upon any such claim, after appraisal pursuant to policy provisions, the claimant within one year after the date of mailing by the Federal Insurance Administration or the servicing agent of the notice of disallowance or partial disallowance of the claim may, pursuant to 42 U.S.C. 4072, institute an action on such claim against the Federal Insurance Administrator in the U.S. District Court for the district in which the insured property or the major portion thereof shall have been situated, without regard to the amount in controversy."

The insuring agreements also set forth an anti-waiver provision in Article VIII D. in this language:

"This Standard Flood Insurance Policy cannot be amended nor can any of its provisions be waived without the express written consent of the federal Insurance administrator. No action we take under

[3]The felony crimes of false claims against the United States are not dependent upon being sworn. 18 U.S.C. Section 287 and 31 U.S.C. Section 3729.

the terms of this policy can constitute a waiver of any of our rights."

Appendix D, infra, is a copy of a letter from Respondent to Petitioner dated September 18, 1986, the relevant portions of which are repeated herein:

> "We have previously advised you of the policy requirements, plus we gave you an additional 10 days to comply. We also previously advised you that if your Proof of Loss was not received in the additional 10 day period, that we would have no alternative but to close our file.
>
> "Under the provisions of the Standard Flood Insurance Policy, you have one year from the date of this denial within which to file suit in the U.S. District Court for the District in which the insured property was located at the time of loss.
>
> "Please be advised that this office waives no policy provision **other than as outlined above** and reserves all rights under the above referenced policy."

Pursuant to letter from Respondent dated July 3, 1985 (following the 1985 flood loss), Petitioner filed a Proof of Loss in letter form with Respondent and with the adjuster on August 11, 1986. That July 3 1985 letter states, inter alia, as follows:

> "3. File a Proof of Loss with the Program within sixty (60) days of the loss. Regarding #3, there is a proof of loss form for this purpose which your adjuster may furnish to you and help you complete, or, which you may obtain directly from NFIP upon request. **You may also submit a Proof of Loss in letter form** if you provide all the information detailed in the referenced policy paragraph — —."

In a letter to counsel for Petitioner on August 12, 1986, the adjuster stated:

> "We understand from Wayne Lutz with National Flood that Don Holeman has already filed Proof of Loss on these four claims."

There was no acknowledgement of the filing of a Proof of Loss except as stated above and in the affidavit of the witness on summary judgment, except such as might be inferred from the invitation to Petitioner to file suit quoted above. There was never any objection to the form or content of the Proof of Loss filed by him on August 11, 1986, nor was there ever any suggestion that remedial steps be taken to perfect such a Proof of Loss.

3. **Factual Summation.**

There was waiver by the Government at two distinct stages in the processing of this case concerning Proof of Loss in verified form:

(a) **Soliciting Proof of Loss in letter form; receipt of Proof of Loss in letter form; actual and implicit acknowledgement of receipt; failure to object or advise Petitioner of any omission.**

(b) **Written waiver of any defect by telling Petitioner to go ahead and file suit, and waiver of the anti-waiver provision itself, in the clear knowledge that a regulation provided against suit otherwise until Proof of Claim, and all that term subsumes, was filed. In short, there would exist no authority otherwise to advise Petitioner to file suit unless the requirement of Proof of Loss was met or waived.**

4. **Texas Law concerning Waiver of Proof of Loss requirements in Insurance cases.**

Under the laws of the State of Texas, substantial compliance with a provision that proof of loss be made is all that ordinarily is required, and unverified notice or statement containing sufficient information to reasonably fulfill the

purposes of a proof of loss constitutes substantial compliance. *Jack Henry v. Aetna Casualty and Surety Company*, 633 S.W. 2nd. 583 (Tex. App. Texarkana, 1982), writ ref'd n.r.e. at page 584, and cases cited therein.

The rule in Texas is that where the insurance company considers the notice of loss inadequate or defective, it must, within a reasonable time, object to the proof and point out the defects so that the insured may correct the same. In the absence of such objections, the company waives its right to complain of the proof furnished. *Henry v. Aetna Casualty and Surety Company*, supra; *Dairyland County Mutual Ins. Co. v. Keys*, 568 S.W. 2nd. 457 (Tex. Civ. App., Tyler, 1978), writ ref'd n.r.e.[6]

Under Texas Law, an anti-waiver provision can be waived, and non-waiver agreements are strictly construed against the insured and will not be extended by implication beyond their exact terms. *Employers Casualty Company v. Tilley*, 496 S.W. 2nd. 552 (Supreme Court 1973), at page 559, quoting with approval Justice Hickman's statement in *Springfield Fire and Marine Ins. Co. v. Hassen*, 53 S.W. 2d. 1031 (Tex. Civ. App. 1932 no writ), "Acts not coming within the plain import of the non-waiver agreements may operate as a waiver."

The Supreme Court of Texas in the *Employers Casualty Company v. Tilley* case, at page 562, placed Texas squarely in the camp of the majority nationwide concerning the construction or interpretation of anti-waiver provisions in insurance contracts.

[6]Petitioner sent his proof of Loss on the letterhead of his attorney to Respondent and Respondent's adjuster on August 11, 1986, within the 60 day time limitation, and no comment was received thereon; it was never acknowledged by anyone (Appendix D, letter of September 18, 1986); and, not until suit was filed was objection made that the Proof of Loss was not in verified form.

Different provisions in the insuring agreement are not only ambiguous and contrary, but, in context, they are ridiculous. On the one hand, it is stated that Respondent, at its option could waive Proof of Loss Requirements, and on the other, that nothing it did, no action it took, would ever constitute a waiver of its rights.[7]

Not only is this true, the evidence from 1985 events, shows that Proof of Loss was waived and swearing of the adjuster's proof of loss was also waived; it was only witnessed.

Finally, in 1986, Petitioner was told to go ahead and sue. A Proof of Loss was not considered a condition precedent. And, finally, the Proof of Loss filed by Petitioner on the letterhead of his counsel was not even acknowledged; much less, objection made thereto.

There was waiver in 1985; there was waiver in 1986.

[7]An outright failure to file a Proof of Loss is not jurisdictional in the context of these policies. *Reeves v. Griffirda*, 756 F. 2d. 1141 (5th Cir. 1985)

REASONS FOR GRANTING THE WRIT

1. **Whether and in what form an estoppel or waiver can be charged against the Federal Government is a subject of conflict in the Circuits and a source of confusion at the trial level.**[8]

Precedent cited in the trial court (affirmed without opinion in the Fifth Circuit) was the 1947 case of *Federal Crop Insurance Corporation v. Merrill*, 332 U.S. 380, a 5-4 decision written by Justice Frankfurther. In *Merrill*, the Court was asked to manufacture an insurance policy out of whole cloth, something which extant regulations prohibited, but, in a context, where the result would have been favorable had only private litigants been involved. It was held that the Government was not estopped by the acts of its agents in issuing such a policy and in accepting premiums. Clearly, a substantive rule of sovereign immunity, not a mere procedural rule, was involved in the case. Cf. *United States v. Sherwood*, 312 U.S. 584, 587 (1941). Nevertheless, the trial court cited *Merrill* as standing for the requirement of procedural nicety, as have some other cases which were cited by the trial judge. *Cohen v. Federal Ins. Administration*, 654 F. Supp. 824, 836 (E.D. N.Y. 1986); *McCrary v. Federal Emergency Management Agency*, 642 F. Supp. 544 (E.D. N.C. 1986).

This court lately has revisited *Merrill* and *INS v. Hibi*, 414 U.S. 5, 8 (1973), where a private litigant asked that an estoppel or detrimental reliance (scienter) be invoked against the Government in the context of an overpayment of CETA

[8] "The issue here is important, not only in economic terms to respondent Hansen, but in constitutional terms as well. The question of when the Government may be equitably estopped has divided the distinguished panel of the Court of Appeals in this case, has received inconsistent treatment from other Courts of Appeals, and has been the subject of considerable ferment." Justice Marshall and Justice Brennan in dissent, *Schweiker v. Hansen*, 450 U.S. 785, at page 791.

reimbursements to a health care provider. This Court rejected the estoppel argument and reversed. *Community Health Services of Crawford County, Inc. v. Califano*, 698 F. 2nd. 615 (3rd Cir. 1983); *Heckler v. Community Health Services of Crawford County, Inc.*, 47 U.S. 51 (1984).

In *Community Health Services*, the Government asked this Court to invoke a flat rule that estoppel may not in any circumstance, run against the Government, and not simply that the Government may not be estopped on the same terms as any other private litigant. Cf. *Merrill*, supra.

This Court declined to do so, citing case precedent where an estoppel had been invoked, and stating:

> "Though the arguments the Government advances for the rule are substantial we are hesitant, when it is unnecessary to decide this case, to say that there are **no cases** in which the public interest in ensuring that the Government can enforce the law free from estoppel might be outweighed by the countervailing interest of citizens in some minimum standard of decency, honor and reliability in their dealings with the Government."[9]

Justice Rehnquist, joined by the Chief Justice, concurred in the result of the Community Health Services majority because even a private party would not have been estopped, but objected to the impression of hospitality to estoppel claims against the Government, not justified by extant case law,

[9] "It is no less good morals and good law that the government should turn square corners in dealing with the people than that the people should turn square corners in dealing with their government." Justice Black dissenting, *St. Regis Paper Co. v. United States* 368 U.S. 208 (1961); "It is very well to say that those who deal with the Government should turn square corners. But there is no reason why the square corners should constitute a one-way Street." Justice Jackson dissenting, *Federal Crop Insurance Corp. v. Merrill*, 332 U.S., at 387-388.

citing *Federal Crop Insurance Corp. v. Merrill*, supra; *Schweiker v. Hansen*, 450 U.S. 785 (1981) (per curiam); *INS v. Miranda*, supra (Per curiam); *Montana v. Kennedy*, 3 U.S. 308 (1961); *Utah Power & Light Co. v. United States*, 243 U.S. 389 (1917); and, distinguishing *United States v. Pennsylvania Industrial Chemical Corp.*, 411 U.S. 655 (1973) (a criminal case) and *Moser v. United States*, 341 U.S. 41 (1951) (not a traditional estoppel case), which had been cited by the majority.

Nevertheless, Justice Rehnquist also left open the possibility of an estoppel against the Government "in a narrow range of circumstances," at page 2228, but opined that *Community Health Services* was not a proper vehicle to define them.

It is in the foregoing context that the Seventh Circuit case of *Meister Bros. Inc. v. Macy*, 674 Fed. 2nd 1174 (1982) interposes, although decided before *Community Health Services*.

In *Meister*, the Court limited its decision to the facts of that case and declined to announce any broad, sweeping rule governing estoppel against the Government because of the action and conduct of its agents, although an estoppel would have been effective against a private insurance carrier, and the Government was engaged in essentially a private insurance business and was not in any sense acting in a sovereign capacity.

The actions and conduct of the agents in *Meister* were simply this: General Adjustment Bureau (GAB) did not present a Proof of Loss form to the insured until well after the 60 day period for filing such proof of loss form otherwise. The claim was fully investigated and reported by the adjuster to FEMA, and the adjuster encouraged negotiations but did not give a proof of loss form to the insured for preparation and filing. On December 22, 1978, some 160 days following the

flood (the flood occurred on July 9, 1978), the adjuster prepared and tendered to the insured a partial proof of loss form which was executed by the insured and this partial proof of loss form was submitted to FEMA in the amount of $50,000.00 which sum was paid to the insured. Negotiations continued for several months thereafter until an impasse was reached and suit was filed finally on August 4, 1980.

The Seventh Circuit discusses estoppel only, although the issue of waiver appears to be paramount. That would appear to be the essence of the holding.

In *Phelps v. Federal Emergency Management Agency*, 785 F. 2d. 13 (3rd Cir. 1986), the Third Circuit disagreed with the Seventh Circuit in *Meister*, and held that neither estoppel nor waiver was available to an insured who failed to file written proof of loss form. It was also held that FEMA could waive proof of loss requirement only by duly executing a written waiver, which it did not do.

In *Phelps*, on March 13 1980, while insured by FEMA, Plaintiffs sustained serious storm damage; FEMA denied coverage and suit was brought in the United States District Court of Massachusetts. FEMA contended that the loss was outside the scope of the policy and that the insured had failed to comply with the contract requirement to file a written proof of loss.[10] With an advisory jury, the trial court ruled for the insured holding that there was a "flood" within the purview of the policy provisions and that FEMA was estopped from

[10]Cases are legion, at least at the trial bench, in these Government insured flood cases, wherein FEMA will advance substantive defenses and all the time insist upon Proofs of Loss, although not agreeing to the substance thereof. It will then fail on, or concede, the substantive and fall back on the procedural. The significance of this tandem defense is that the insured is led to believe that the only impediment to recovery is the substantive issue and he concentrates on that, only to learn later, when his case is sub judice, that a trap has been sprung. The present case followed that format precisely, and once again the modus operandi succeeded.

raising the defense of failure to file proof of loss by the acts of its agents in assuring Plaintiffs that they had done everything necessary until the time for filing had expired, 60 days from the date of the loss. The Court observed that had Phelps purchased their flood insurance from a private carrier, there would be no doubt whatsoever that they could have invoked the doctrine of estoppel, but declined to do so against the Government insurance carrier, and so disagreed with the Seventh Circuit in *Meister*, citing the *Merrill, Hansen* and *Community Health Services* cases of this Court.

For similar reasons the *Phelps* Court also ruled that FEMA could waive the proof of loss requirement only by duly executing a written waiver, under the terms of the policy, which it did not do.

In *Reeves v. Guiffirda*, 756 F. 2d. 1141 (5th Cir. 1985), the Fifth Circuit cited the *Meister* case from the 7th Circuit with approval (A panel of Clark, Chief Justice, Wisdom and Higginbotham, Circuit Judges), a case where a proof of loss was not filed, but the proof showed that the loss had been investigated and appraised, reinvestigated and reevaluated, and the Plaintiff, Reeves, had been assured that all conditions for claim of loss had been complied with and FEMA's determination would be forthcoming.

In *Reeves*, the Government filed a motion to dismiss under Federal Rule of Civil Procedure 12(b) (1) on the ground that Plaintiff had failed to submit a sworn proof of loss within 60 days of the damage and that this was a prerequisite to suit on the policy, so that the Court did not have subject matter jurisdiction. This was granted by the Trial Court. The Fifth Circuit treated the motion as one under Rule 12(b) (6), and concluded that the jurisdictional challenge was inseparable from the merits of the legal issue. In that connection, citing the *Meister* case, with approval, the Fifth Circuit quoted the familiar rule that "A complaint should not be dismissed for

failure to state a claim unless it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

Referring to the Seventh Circuit case of *Meister*, and *Dempsey v. Director, Federal Emergency Management Agency*, 549 F. Supp. 1334 (E.D. Ark. 1982), the panel of the Fifth Circuit held that the existence of the *Meister* and *Dempsey* decisions was "enough to preclude a ruling that there is beyond doubt. . .no set of facts under which the Plaintiff could prevail," but expressed no view on whether Plaintiff could estop the Government.

The present case has stronger factual support for waiver, or for that matter, estoppel, then did the *Reeves* case. Yet, in the present case, a panel of the Fifth Circuit, including Justice Higginbotham, affirmed the trial bench summarily, without opinion and without publication since the case had no precedential value since decided upon "well-settled principles of law. . .".

Thus, it is unclear if the Fifth Circuit lines up with *Meister* or with *Phelps*.

The Ninth Circuit is consistent with the Seventh Circuit, at least prior to this Court's *Hansen* and *Community Health Services Corporation* decisions, ie., situations in which the Government specifically encouraged a mistake of which it then took advantage. *United States v. Lazy FC Ranch*, 481 F. 2d 985 (9th Cir. 1973), cf., *United States v. Fox Lake State Bank*, 366 F. 2d. 962 (7th Cir. 1966).

Accordingly, there appears to be a continuing conflict and confusion among circuits concerning the parameters of estoppel and waiver following this Court's decisions in *Hansen* and *Community Health Services Corporation* based upon facts equivalent to those present in this case.

2. **The Federal Common Law controls the resolution of the issues in this case.**

The insuring agreements in this case provide in Article X:

> "This policy is governed by the flood insurance regulations issued by FEMA, the National Flood Insurance Act of 1968, as amended (42 USC Section 4001, et seq.) and Federal Common Law."

In addition, at the discovery stage, the Government conceded "that the Federal Common Law, including decisional law relating to good faith and fair dealing in insurance cases applies in this case."

The precise question concerns the source of that "Federal Common Law," more especially since Congress has not spoken to specify a rule of decision. When there is little need for a nationally uniform body of law, state law may be incorporated as the federal rule of decision provided that application of state law would not frustrate specific objectives of federal programs and the application of a federal rule will not disrupt commercial relationships predicated upon state law. *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, at page 727.

The state law of Texas is clear concerning waivers in the case of private insurance contracts. See discussion, supra. A Federal rule of general application, however, may be found in the traditional common-law technique of decision by drawing upon standard insurance law principles. *West v. Harris*, 573 F. 2d. 873 (5th Cir. 1978), citing and relying upon Justice Jackson's concurrence in *D'Oench, Duhme & Co. v. F.D.I.C.*, 315 U.S. 447, 471-72 (1942); *Drewitt v. Aetna Casualty & Surety Co.*, 539 F. 2d 496 (5th Cir. 1976).

The Supreme Court of Texas in *Employers Casualty Company v. Tilley*, supra, at page 562, quoted, as being dispositive of the general majority rule, from Appleman, *Insurance Law and Practice*, Section 9377, at pages 879-880,

concerning anti-waiver provisions in insurance contracts as follows:

> "It is clear, however, that a nonwaiver agreement can be waived either expressly or impliedly by the insurer or its authorized representatives. Such agreements are construed strictly against the insurer and liberally in favor of the insured, and will not be extended beyond the exact terms of the agreements. . .The mere obtaining of a nonwaiver agreement does not give the insurer a right to do anything it may wish to prejudice the rights of the insured and thereafter continue to rely upon the nonwaiver agreement since such agreement may be waived by the insurer's subsequent conduct."

Therefore, assuming uniformity to be a desirable goal in these Government insurance flood cases, *West v. Harris*, supra, the result is the same whether the law of Texas or any one state is implicated. If general insurance law is the desirable guide for purposes of a Federal Common Law concerning alleged minor defects or omissions in Proof of Loss forms, the result is the same. There was waiver.

For the foregoing reasons, it is prayed that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

James Q. Smith
2301 Midwestern Parkway, Suite 208
Wichita Falls, Texas 76308-2387
(817) 692-7358
Counsel for Petitioner

November 28, 1988

Appendix

Appendix A-1

FOR THE FIFTH CIRCUIT

No. 88-1306
Summary Calendar
D.C. Docket No. CA-7-86-104

DONALD L. HOLEMAN,

Plaintiff-Appellant,

versus

DIRECTOR, FEDERAL EMERGENCY MANAGEMENT AGENCY FOR THE NATIONAL FLOOD INSURANCE PROGRAM,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Texas

Before GEE, WILLIAMS, and HIGGINBOTHAM, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the record on appeal and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendant-appellee the costs on appeal, to be taxed by the Clerk of this Court.

August 31, 1988

ISSUED AS MANDATE: SEP 22 1988

OP-JDT-9C
Rev. 4/85

Appendix A2

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

88-1306
Summary Calendar

D.C. Docket No. CA-7-86-104

DONALD L. HOLEMAN,

Plaintiff-Appellant,

versus

DIRECTOR, FEDERAL EMERGENCY MANAGEMENT AGENCY FOR THE NATIONAL FLOOD INSURANCE PROGRAM,

Defendant-Appellee

Appeal from the United States District Court for the
Northern District of Texas
(CA-7-86-104)

(August 31, 1988)

Before GEE, WILLIAMS, and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:*

For the reasons stated in its order filed April 22, 1988, the judgment of the district court is

AFFIRMED.

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Appendix B-1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

DONALD L. HOLEMAN,

Plaintiff,

CIVIL ACTION NO. CA 7-86-0104

VS.

DIRECTOR, FEDERAL EMERGENCY MANAGEMENT AGENCY, et al.,

Defendant.

JUDGMENT

The Court has this date entered its Order granting Summary Judgment for Defendant Director, Federal Emergency Management Agency, et al., in the above cause.

It is therefore ORDERED, ADJUDGED, AND DECREED that Plaintiff take nothing and Defendant recover his cost of the suit.

It is SO ORDERED.

Entered this 22nd day of April, 1988.

MARY LOU ROBINSON
UNITED STATES DISTRICT JUDGE

Appendix B-2

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

DONALD L. HOLEMAN,

Plaintiff,

CIVIL ACTION NO. CA 7-86-0104

VS.

DIRECTOR, FEDERAL EMERGENCY
MANAGEMENT AGENCY, et al.,

Defendant.

ORDER

Before the Court is Defendant's Motion for Summary Judgment. The Motion is granted.

Defendant filed this Motion for Summary Judgment claiming that it was entitled to judgment as a matter of law because Plaintiff had failed to comply with the requirement of the insurance policy that a sworn proof of loss be submitted within 60 days of the loss and that Plaintiff had failed to comply with the requirements of the Federal Tort Claims Act in bringing his Deceptive Trade Practices claims.

Plaintiff maintains that the letter and spirit of the requirement were complied with by filing a proof of loss in letter form. Plaintiff complains that the official forms for the proof of loss were not supplied, even though he was constantly reminded of the need for the proof. Plaintiff relies on a July 3, 1985 letter from the Agency which states "You may also submit a proof of loss in a letter form if you provide all the

information detailed in the referenced policy paragraph. . . ."

The relevant paragraph states "4. Within 60 days after the loss, send us a proof of loss, which is your statement as to the amount you are claiming under the policy, signed and sworn to by you and furnishing us with the following information:" Standard Flood Insurance Policy, Art. VIII, Para. I, 4, issued to Donald Holeman.

The letter submitted by Plaintiff's attorney does not comply with the requirements of a sworn proof of loss. Even if the attorney was acting as an agent of the insured, the letter was not sworn to. The FEMA had informed the Plaintiff that a proof of loss could be made in letter form, however this did not obviate the need for a sworn statement. The insurance policy identified "proof of loss" as a sworn statement signed by the insured. If an insurer is an agency of the United States, procedural requirements must be complied with strictly. *United States v. Sherwood*, 312 U.S. 584, 587 (1941).

Procedural requirements in federal insurance policies must be strictly enforced. *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380. An insured's failure to provide a timely and complete **sworn** proof of loss statement will excuse the federal insurer's obligation to pay on an otherwise valid claim of loss. *Cohen v. Federal Ins. Admin.*, 654 F. Supp. 824, 826 (E.D.N.Y. 1986).

(continued)

Thus Plaintiff's failure to submit a sworn proof of loss precludes recovery under Plaintiff's claims for breach of contract. **See e.g.** *McCrary v. Federal Emergency Management Agency*, 642 F. Supp. 544 (E.D. N.C. 1986).[1]

Plaintiff also seeks recovery under the Texas Deceptive Trade Practices Act. Such claims are barred by the Federal Tort Claims Act. *A.L.T. Corp. v. Small Business Administration*, 801 F. 2d 1451 (5th Cir. 1986).[2] Defendant alleges, and Plaintiff does not deny, that the notice requirements of the Act have not been complied with, further there is not indication that the administrative remedies available under the Act have been exhausted. Thus any claim which Plaintiff attempted to bring in tort and under the Texas Deceptive Trade Practices Act is barred. *A.L.T. Corp.*, 801 F. 2d at 1462.

Defendant's Motion is granted. Defendant is entitled to judgment as a matter of law on all causes of action.

It is SO ORDERED.

Entered this 21st day of April, 1988.

MARY LOU ROBINSON
UNITED STATES DISTRICT JUDGE

[1]Plaintiffs submitted estimates of repair in a letter to the FEMA, but did not file a sworn proof of loss because forms were not available and because the agency had previously accepted estimates as a proof of loss. The district court held that estimate did not comply with the requirements for a proof of loss which was a prerequisite to filing suit to recover under the insurance policy.

The insurance policy in this case has a similar provision. Article VIII, paragraph Q, entitled "Conditions for filing a lawsuit" states: "You may not sue us to recover money under this policy unless you have first complied with all of the requirements of the policy."

[2]Even though the Director of the Agency is being sued, the Fifth Circuit has held that a suit against the Director of the Federal Emergency Management Agency is a suit against the federal government. *In Re Estate of Lee*, 812 F. 2d 253 (5th Cir.)

4053. Adjustment and payment of claims; judicial review; limitations; jurisdiction

The insurance companies and other insurers which form, associate, or otherwise join together in the pool under this part may adjust and pay all claims for proved and approved losses covered by flood insurance in accordance with the provisions of this chapter and, upon the disallowance by any such company or other insurer of any such claim, or upon the refusal of the claimant to accept the amount allowed upon any such claim, the claimant, within one year after the date of mailing of notice of disallowance or partial disallowance of the claim, may institute an action on such claim against such company or other insurer in the United States district court for the district in which the insured property or the major part thereof shall have been situated, and jurisdiction is hereby conferred upon such court to hear and determine such action without regard to the amount in controversy.

Pub. L. 90—448, Title XIII, 1333, Aug. 1, 1968, 82 Stat. 583.

Appendix C-2

PART B—GOVERNMENT PROGRAM WITH INDUSTRY ASSISTANCE

4071. Federal operation of program; determination by Secretary; fiscal agents; report to Congress

(a) If at any time, after consultation with representatives of the insurance industry, the Secretary determines that operation of the flood insurance program as provided under part A cannot be carried out, or that such operation, in itself, would be assisted materially by the Federal Government's assumption, in whole or in part, of the operational responsibility for flood insurance under this chapter (on a temporary or other basis) he shall promptly undertake any necessary arrangements to carry out the program of flood insurance authorized under subchapter I of this chapter through the facilities of the Federal Government, utilizing, for purposes of providing flood insurance coverage, either —

(1) insurance companies and other insurers, insurance agents and brokers, **and insurance adjustment organizations, as fiscal agents of the United States.**

(2) officers and employees of the Department of Housing and Urban Development, and such other officers and employees of any executive agency (as defined in section 105 of Title 5) as the Secretary and the head of any such agency may from time to time, agree upon, on a reimbursement or other basis, or

(3) both the alternatives specified in paragraphs (1) and (2).

(b) Upon making the determination referred to in subsection (a) of this section, and at least thirty days prior to implementing the program of flood insurance authorized under subchapter I of this chapter through the facilities of the Federal Government, the Secretary shall make a report to the

Congress and such report shall —

(1) state the reasons for such determination,

(2) be supported by pertinent findings,

(3) indicate the extent to which it is anticipated that the insurance industry will be utilized in providing flood insurance coverage under the program, and

(4) contain such recommendations as the Secretary deems advisable.

Pub. L. 90—448, Title XIII, 1340, Aug. 1, 1968, 82 Stat. 584.

Historical Note

Effective Date. Section effective one hundred and twenty days following Aug. 1, 1968, except that the Secretary, on the basis of a finding that conditions exist necessitating the prescribing of an additional period, may prescribe a later effective date which in no event shall be more than one hundred and eighty days following Aug. 1, 1968, see section 1377 of Pub. L. 90—448, set out as a note under section 4001 of this title.

Legislative History. For legislative history and purpose of Pub. L. 90—448, see 1968 U.S. Code Cong. and Adm. News p. 2873.

4072. Adjustment and payment of claims; judicial review; limitations; jurisdiction.

In the event the program is carried out as provided in section 4071 of this title, **the Secretary shall be authorized to adjust and make payment of any claims for proved and approved losses covered by flood insurance**, and upon the disallowance by the Secretary of any such claim, or upon the refusal of the claimant to accept the amount allowed upon any such claim, the claimant, within one year after the date of mailing of notice of disallowance or partial disallowance by the Secretary, may institute an action against the Secretary on such claim in the United States district court for the district in which the insured property or the major part thereof shall have been situated, and jurisdiction is hereby conferred upon such court to hear and determine such action **without regard to the amount in controversy**.

Pub. L. 90—448, Title XIII, 1341, Aug. 1, 1968, 82 Stat. 584.

Historical Note

Effective Date. Section effective one hundred and twenty days following Aug. 1, 1968, except that the Secretary, on the basis of a finding that conditions exist necessitating the prescribing of an additional period, may prescribe a later effective date which in no event shall be more than one hundred and eighty days following Aug. 1, 1968, see section 1377 of Pub. L. 90—448, set out as a note under section 4001 of this title.

Legislative History. For legislative history and purpose of Pub. L. 90—448, see 1968 U.S. Code Cong. and Adm. News, p. 2873.

PART C—GENERAL PROVISIONS

4081. Services by insurance industry; contracts, agreements, or other arrangements

(a) In administering the flood insurance program under this subchapter, the Secretary is authorized to enter into any contracts, agreements, or other appropriate arrangements which may, from time to time, be necessary for the purpose of utilizing, on such terms and conditions as may be agreed upon, the facilities and services of any insurance companies or other insurers, insurance agents and brokers, **or insurance adjustment organizations**; and such contracts, agreements, or arrangements may include provision for payment of applicable operating costs and allowances for such facilities and services as set forth in the schedules prescribed under section 4018 of this title.

(b) Any such contracts, agreements, or other arrangements may be entered into without regard to the provisions of section 5 of Title 41 or any other provision of law requiring competitive bidding.

Pub. L. 90—448, Title XIII, 1345, Aug. 1, 1968, 82 Stat. 585.

Historical Note

Effective Date. Section effective one hundred and twenty days following Aug. 1, 1968, except that the Secretary, on the basis of a finding that conditions exist necessitating the prescribing of an additional period, may prescribe a later effective date which in no event shall be more than one hundred and eighty days following Aug. 1, 1968, see section 1377 of Pub. L. 90—448, set out as a note under section 4001 of this title.

Legislative History. For legislative history and purpose of Pub. L. 90—448, see 1968 U.S. Code Cong. and Adm. News, p. 2873.

Appendix C-7

FEDERAL EMERGENCY MANAGEMENT AGENCY
FEDERAL INSURANCE ADMINISTRATION

STANDARD FLOOD INSURANCE POLICY

[Issued Pursuant to the National Flood Insurance Act of 1968, or Any Acts Amendatory Thereof]

DWELLING FORM—INSURING AGREEMENT

EXHIBIT A

INSUREDS_NAME_AND_ADDRESS

DONALD L HOLEMAN
P O BOX 563
WINCHITA FALLS TX 76307

AGENTS_NAME_AND_ADDRESS

WILLIAM E LAVE
BILL LANE IS AGCY
POB 4432 3506 MCNIEL
WICHITA TX 76308

Agreement of Insurance Between the Federal Emergency Management Agency (FEMA), as Insurer, (hereinafter known as "we", "our" and "us") and the Insured (hereinafter known as "you" and "your"). Based upon your having paid the correct amount of premium, our reliance on the accuracy of the information and statements you have furnished in the application for this policy about the property to be insured and subject to all the terms of this policy, the National Flood Insurance Act of 1968, as amended (42 U.S.C. 4001 et seq.), and regulations issued by us (Title 44 Code of Federal Regulations), we insure you and your legal representatives against all "Direct Physical Loss By or From Flood" to the insured property as defined in the "Definitions Section" of this Agreement to the extent of the actual cash value of the property at the time of loss but not exceeding (1) the cost of replacing the insured building at the time of loss with material of like kind and quality and (2) the actual cash value of any insured personal property at the time of loss.

Now therefore, in consideration of the foregoing and the mutual promises exchanged herein, we and you agree, further, as follows:

ARTICLE I—PERSONS INSURED

We insure only:

A. The named Insured and legal representatives;

B. Any mortgagee and loss payee named in the application and declaration page in the order of precedence and to the extent of their interest but for no more, in the aggregate, than the interest of the named insured.

ARTICLE II—DEFINITIONS

"Actual Cash Value" means the replacement cost of an insured item of property at the time of loss, less the value of physical depreciation as to the item damaged.

"Application" means the statement made and signed by you or your agent, and giving information on the basis of which we determine the acceptability of the risk, the policy to be issued and the correct premium payment, which must accompany the application for the policy to be issued. The application is a part of this flood insurance policy.

"Basement" means any area of the building having its floor subgrade (below ground level) on all sides.

"Building" means a walled and roofed structure, other than a gas or liquid storage tank, that is principally above ground and affixed to a permanent site, including a mobile home on foundation, subject to Article V(H), and a walled and roofed building in the course of construction, alteration or repair. This policy does not cover more than one building.

"Cancellation" means that ending of the insurance coverage provided by this policy prior to the expiration date.

"Coastal High Hazard Area" means an area subject to high velocity waters, including hurricane wave wash and tsunami.

"Declarations Page" is a computer generated summary of information furnished by you in the application for insurance. The declarations page is a part of this flood insurance policy.

"Doublewide Mobile Home" means a building which is fully anchored and affixed to its permanent site, and which is designed and constructed as a modular or manufactured building and which has axles and wheels used solely for transportation to the lot or construction site where it is to be assembled as a nonmovable, permanent building; such a building is not considered to be a mobile home for purposes of this policy.

"Dwelling" means a building designed for use as a residence for no more than four families.

"Direct Physical Loss by or From Flood" means any loss in the nature of actual loss of or physical damage, evidenced by physical changes, to the insured property (building or personal property contents) which is directly and proximately caused by a "flood" (as defined in this Agreement), while the insured property is located: 1. at the property address shown on the application for this insurance, which is a part of this Agreement; and 2. for forty-five days, at another place above ground level, or outside of the special flood hazard area, to which any of the property shall necessarily be removed by you in order to protect and preserve it from flood or from the imminent danger of flood (provided, personal property so removed must be placed in a fully enclosed building or otherwise reasonably protected from the elements to be insured against loss), in which case the reasonable expenses incurred by you, including the value of your own labor at prevailing Federal minimum wage rates in moving your insured property away from the peril of flood and storing your property at the temporary location, shall be reimbursed to you. The term "Direct Physical Loss by or From Flood" shall not include compensation for loss of access, loss of use, loss of profits, or loss resulting from interruption of business, profession or manufacture, or reimbursement for your additional living expenses, incurred by reason of your having to live in rented quarters while the insured building is being repaired or replaced, or allowance for any increased cost of repair or reconstruction as a result of any ordinance regulating reconstruction or repair, or other economic loss.

"Expense Constant": The expense constant is a flat charge per policy term, paid by the Insured to defray the Federal Government's policy-writing and other expenses.

"Expiration Date" means the ending of the insurance coverage provided by this policy on the expiration date shown on the declaration page.

"Flood": Wherever in this policy the term "flood" occurs, it shall be held to mean:

A. A general and temporary condition of partial or complete inundation of normally dry land areas from:

1. The overflow of inland or tidal waters.

2. The unusual and rapid accumulation or runoff of surface waters from any source.

3. Mudslides (i.e., mudflows) which are proximately caused by flooding as defined in subparagraph A-2, above and are akin to a river of liquid and flowing mud on the surfaces of normally dry land areas, including your premises, as when earth is carried by a current of water and deposited along the path of the current.

B. The collapse or subsidence of land along the shore of a lake or other body of water as a result of erosion or undermining caused by waves or currents of water exceeding the cyclical levels which result in flooding as defined in A-1 above.

Appendix C-8

"Policy" means the entire writte[n] ntract between you and us: it includes this printed form, the appli[cation], and declarations page, any endorsements which may be issued [by] any renewal certificates indicating that coverage has been instituted for a new policy and policy term. Only one building, specifically described by you in the application, may be insured under this policy.

"Walled and Roofed" means the building has in place two or more exterior, rigid walls and the roof is fully secured so that the building will resist flotation, collapse and lateral movement.

ARTICLE III—LOSSES NOT COVERED

We only provide coverage for direct, physical loss by flood which means we do not cover:

A. Losses from other casualties, including:

1. Loss caused by theft, loss of profits, fire, windstorm, wind, explosion, earthquake, land sinkage, land subsidence, landslide, gradual erosion, or any other earth movement except such mudslides (i.e., mudflows) or erosion as is covered under the peril of flood.

2. Loss caused by rain, snow, sleet, hail, water spray, freezing, thawing, the pressure or weight of ice or water, sewer backup and seepage of water unless your property has been, at the same time, damaged by a flood.

3. Water or moisture damage resulting primarily from any condition substantially confined to the insured building or from any condition which is within your control (including but not limited to design, structural or mechanical defects, failures, stoppages or breakages of water or sewer lines, drains, pumps, fixtures or equipment).

B. Losses of the following nature:

1. Loss caused by your failure to use means reasonably accessible to you to save the property from loss resulting from a flood and to preserve the property after a flood; however, the reasonable expenses incurred by you in saving and preserving the property at the premises after a flood—including the value of your own labor at prevailing Federal minimum wage rates—may, at our sole option, be a covered loss.

2. A loss which is already in progress as of 12:01 A.M. of the first day of the policy term, or, as to any increase in the limits of coverage which is requested by you, a loss which is already in progress when you request the additional coverage.

3. A loss from a flood which is confined to the premises on which your insured property is located unless the flood is displaced over two acres of the premises.

4. A loss caused by your modification to the insured property or the described premises on which the insured property is located, which materially increases the risk of flooding.

5. Loss caused intentionally by you or any member of your household.

ARTICLE IV—PROPERTY COVERED
(Subject to "Property Not Covered" Provisions)

We will pay for physical damage caused by flood to the building at the property address you have furnished, as well as the contents of the building, if you have purchased contents coverage, and provided you have paid the correct premium for the insurance, as follows:

A. We cover your dwelling, which includes:

1. A residential building, designed for principal use as a dwelling place for no more than four families;

2. Additions and extensions attached to and in contact with the dwelling;

3. Building equipment, fixtures and outdoor equipment used in connection with the dwelling while stored inside the dwelling or another fully enclosed building at the property address;

4. Materials and supplies to be used in constructing, altering or repairing the dwelling or another building insured by us at the property address while stored inside a fully enclosed building (i) at the property address or (ii) on an adjacent property at the time of loss, or (iii) in case of another building at the property address which does not have walls on all sides, while stored and secured to prevent flotation out of the building during flooding (the flotation out of the building shall be materials and s[upplies] were not reasonably secured to prevent flotation, in which c[ase] no coverage is provided for such materials and supplies under th[is] policy).

5. As appurtenant structures, detached garages and carports located at the described premises, at your option at the time of loss, in an amount up to 10% of the amount of insurance you have purchased to cover the dwelling, including additions to the dwelling; to the extent you exercise this option, you reduce the amount of insurance available to cover loss relating to A(1) (2) (3) and (4), above, to the dwelling and this option may not be chosen so as to extend coverage to buildings: (i) occupied, rented or leased in whole or in part for dwelling purposes (or held for such use), or (ii) used in whole or in part for personal or commercial manufacturing or farming purposes (or held for such uses), or (iii) which are boathouses.

B. We cover your Personal Property as contents incidental to the occupancy of the building as a dwelling under the policy, subject to "C" below, and that belonging to members of your family in your household and, at your option within the limits of contents coverage purchased for personal property loss, guests' and servants' personal property and the personal property of others for which you may be responsible—all while stored within a building at the property address. Personal property in the open and not stored in a building at the property address shall not be covered against loss by flood under this policy. However, personal property located in buildings having in place two or more rigid walls and a fully secured roof are covered if the contents are secured to prevent flotation out of the building during flooding; the flotation out of the building during flooding of any such contents shall be deemed by you and us to establish the conclusive presumption that the contents were not reasonably secured to prevent flotation. At your option at the time of loss, in an amount up to 10% of the amount of insurance you have purchased to cover personal property, this policy will also cover:

1. Loss to improvements, alterations, and additions made by you, as a Tenant, to the described building at the property address;

2. If you are an individual condominium unit owner, loss to the interior walls, floors, and ceilings of your unit that are not otherwise covered under a condominium association policy.

C. Limitation: As a limitation on "B", above, we shall not reimburse you for loss in any one flood as to the following personal property to the extent the total loss of such property exceeds $250.00: paintings, etchings, pictures, tapestries, art glass windows and other works of art (such as, but not limited to, statuary, marbles, bronzes, antique furniture, rare books, antique silver), necklaces, bracelets, gems, precious or semi-precious stones, articles of gold, silver, or platinum and furs or any article containing fur which represents its principal value.

D. Debris Removal: Within the limits of your coverage, we cover any expense you incur, including the value of your own labor at prevailing Federal minimum wage rates, as a result of removing debris of, on or from the insured property so long as the debris problem was directly caused by a flood.

E. Demolition Coverage: Within the limits of your coverage, you may apply all or part of the proceeds of any flood insurance claim you make under this policy toward the expenses you incur in removing damaged portions of the insured building from the property location following a flood loss.

ARTICLE V—PROPERTY NOT COVERED

We do not cover and will not pay for damage to or loss of any of the following:

A. Accounts, bills, currency, deeds, evidences of debt, money, coins, medals, postage stamps, securities, bullion, manuscripts, or other valuable papers or records and contents used in connection with any incidental commercial occupancy or use of the building.

B. On and after October 1, 1982, newly constructed or substantially improved buildings located seaward of mean high tide, or entirely in, on, or over water.

C. Fences, retaining walls, seawalls, outdoor swimming pools,

located on or over water, including boat houses or other similar structures or buildings into which boats are floated or personal property in the open.

D. Land values, lawn, trees, shrubs or plants, growing crops, or livestock; underground structures and equipment including wells, septic tanks or septic systems; those portions of walks, driveways and other paved or poured surfaces, outside the foundation walls of the building.

E. Animals, birds, fish; aircraft, any self-propelled vehicle or machine and motor vehicles (other than motorized equipment pertaining to the service of the premises, operated principally on the premises of the insured, and not licensed for highway use) including their parts and equipment, trailers on wheels and other recreational vehicles whether affixed to a permanent foundation or on wheels; watercraft including their furnishings and equipment; and business property.

F. Enclosures, contents, machinery, building components, equipment and fixtures located at an elevation lower than the lowest elevated floor of an elevated building (except for the required utility connections and the footing, foundation, posts, pilings, piers or other foundation walls and anchorage system as required for the support of the elevated building), including a mobile home; finished basement walls, floors, ceilings and other improvements to a basement having its floor subgrade on all sides, and contents, machinery, building equipment and fixtures in such basement areas; except that as to this subparagraph (F), coverage is provided, in basement areas and in areas below the lowest elevated floor of an elevated building for sump pumps, well-water tanks, oil tanks, furnaces, hot water heaters, clothes washers and dryers, food freezers, air conditioners, heat pumps and electrical junction and circuit breaker boxes; and coverage is also provided in basement areas and in areas below the lowest elevated floor of an elevated building for stairways and staircases attached to the building which are not separated from the building by elevated walkways.

G. Buildings and their contents, including machinery and equipment, which are part of the building, where more than 49 percent of the actual cash value of such buildings is below ground, unless the lowest level is at or above the base flood elevation (in the Regular Program) or the adjacent ground level (in the Emergency Program) by reason of earth having been used as an insulation material in conjunction with energy efficient building techniques.

H. On and after October 1, 1982, a mobile home located or placed within a FEMA designated Special Flood Hazard Area that is not affixed to a permanent site (anchored) to resist flotation, collapse, or lateral movement by providing over-the-top and frame ties to ground anchors or that otherwise does not meet the community's flood plain management requirements, unless it is a mobile home on a foundation continuously insured by the National Flood Insurance Program at the same site at least since September 30, 1982.

I. Units which are primarily containers, rather than buildings (such as gas and liquid tanks).

J. A mobile home and its contents located within a FEMA designated coastal high hazard area (Zones V1-V30 on a FEMA Flood Insurance Rate Map) which is not located in a mobile home park or subdivision in existence and open for business prior to June 1, 1982.

K. A building, and its contents, if the building was newly constructed or substantially improved on or after October 1, 1983 in an area designated as an undeveloped coastal barrier, within the Coastal Barrier Resources System established by the Coastal Barrier Resources Act (Pub. L. 97-348).

ARTICLE VI—DEDUCTIBLES

A. Each loss to your insured property is subject to a deductible provision under which you bear a portion of the loss before payment is made under the policy.

B. The loss deductible shall apply separately to each building loss and personal property (contents) loss including, as to each, appurtenant structure, debris removal, and any reasonable expenses incurred after a flood under Article II or Article III in connection with the preservation and saving of insured property from flood or from the imminent danger of flood.

C. The amount of the deductible for each loss occurrence is determined as follows: we shall be liable only when such loss exceeds $500.00, or the amount of any higher deductible which you selected when you applied for this insurance or when you raised the deductible by endorsement.

D. In the case of reasonable expenses incurred pursuant to Article II in the temporary removal of an insured mobile home or insured personal property from the described premises and away from the peril of flood, the amount of the deductible shall be $50.00.

ARTICLE VII—REPLACEMENT COST PROVISIONS

Subject to Article VI and the limits of building coverage you have purchased, these provisions shall apply only to a Single Family Dwelling which is the principal residence of the Insured and which is covered under this policy. Outdoor antennas and aerials, carpeting, awnings, appliances and other outdoor equipment, all whether attached to the insured building or not, are excluded from the replacement cost coverage. For purposes of Article VII, a single family dwelling qualifies as your principal residence provided that at the time of the loss, you or your spouse have lived in your building for either (1) 80% of the calendar year immediately preceding the loss or (2) 80% of the period of your ownership of the insured building, if less than one calendar year immediately preceded the loss. For purposes of this Article, the replacement cost provisions do not apply to a condominium unit within a vertical building having one or more condominium units in it not contiguous to the ground. Under this Article:

A. If at the time of loss the total amount of insurance applicable to said dwelling is 80% or more of the full replacement cost of such dwelling, or is the maximum amount of insurance available under the National Flood Insurance Program, the coverage of this policy applicable to such dwelling is extended to include the full cost of repair or replacement (without deduction for depreciation).

B. If at the time of loss the total amount of insurance applicable to said dwelling is less than 80% of the full replacement cost of such dwelling and less than the maximum amount of insurance available under the National Flood Insurance Program, our liability for loss under this policy shall not exceed the larger of the following amounts:

1. The actual cash value (meaning replacement cost less depreciation) of that part of the dwelling damaged or destroyed; or

2. That portion of the full cost of repair or replacement without deduction for depreciation of that part of the dwelling damaged or destroyed, which the total amount of insurance applicable to said dwelling bears to 80% of the full replacement cost of such dwelling.

If 80% of the full replacement cost of such dwelling is greater than the maximum amount of insurance available under the National Flood Insurance Program, use the maximum amount in lieu of the 80% figure in the application of this limit.

C. Our liability for loss under this policy shall not exceed the smallest of the following amounts:

1. The limit of liability of this policy applicable to the damaged or destroyed building.

2. The replacement cost of the dwelling or any part thereof identical with such dwelling on the same premises and intended for the same occupancy and use; or

3. The amount actually and necessarily expended in repairing or replacing said dwelling or any part thereof intended for the same occupancy and use.

D. When the full cost of repair or replacement is more than $1,000 or more than 5% of the whole amount of insurance applicable to said dwelling, we shall not be liable for any loss under paragraph A or subparagraph B-2 of these provisions unless and until actual repair or replacement is completed.

E. In determining if the whole amount of insurance applicable to said dwelling is 80% or more of the full replacement cost of such dwelling, the cost of excavations, underground flues and pipes, underground wiring and drains, and brick, stone and concrete foundations, piers and other supports which are below the under surface of the lowest basement floor, or where there is no basement, which are below the surface of the ground inside the foundation walls, shall be disregarded.

F. You may elect to disregard this condition in making claim hereunder, but such election shall not prejudice your right to make further claim within 180 days after loss for any additional liability brought about by these provisions.

G. These Replacement Cost Provisions do not apply to any mobile home or personal property (contents) covered under this policy, nor do they apply to any loss where insured property is abandoned and remains as debris at the property address following a loss.

H. If your dwelling sustains a total loss or if we should pay you the entire building loss proceeds under these replacement cost provisions, there is no requirement that you rebuild the building at the insured property address.

ARTICLE VIII—GENERAL CONDITIONS AND PROVISIONS

A. Pair and Set Clause: If you lose an article which is part of a pair or set, we will have the option of paying you an amount equal to the cost of replacing the lost article, less depreciation, or an amount which represents the fair proportion of the total value of the pair or set that the lost article bears to the pair or set.

B. Concealment, Fraud: We will not cover you under this policy, which shall be void, nor can this policy be renewed or any new flood insurance coverage be issued to you if you have sworn falsely, or willfully concealed or misrepresented any material fact, or done any fraudulent act concerning this insurance (See "F", below). In addition we will not cover you under this policy, which shall be void, in the event you have willfully concealed or misrepresented any fact on a "Recertification Questionnaire", which causes us to issue a policy to you based on a premium amount which is less than the premium amount which would have been payable by you were it not for the misstatement of fact (see "G", below).

C. Other Insurance: You may have other flood insurance covering the dwelling and personal property and, if you have such other in-

is void from its inception date;

c. If, during the term of the policy, the participation in the National Flood Insurance Program of the community in which your property is located ceases, in which case the policy shall be deemed void effective at the end of the last day of the policy year in which such cessation occurred and shall not be renewed; in the event the voided policy included three policy years in a contract term of three years, you shall be entitled to a pro-rata refund of any premium applicable to the remainder of the policy's term after voidance of the policy;

d. In the event you or your agent have (i) sworn falsely or (ii) fraudulently or willfully concealed or misrepresented any material fact (including facts relevant to the rating of this policy) in the application for coverage, or upon any renewal of coverage, or in connection with the submission of any claim brought under the policy, in which case this entire policy shall be void as of the date the wrongful act was committed or from its inception if this policy is a renewal policy and the wrongful act occurred in connection with an application for or renewal or endorsement of a policy issued to you in a prior year and affects the rating of or premium amount received for this policy. Refunds of premiums, if any, shall be subject to offsets for our administrative expenses (including the payment of agent's commissions for any voided policy year), in connection with the issuance of the policy.

e. The premium you submit is less than $50.00 in connection with any application for a new policy or policy renewal, in which case the policy is void from its inception date.

2. **Reduction of coverage limits or reformation:** In the event that the premium payment received by us is not sufficient to purchase the amounts of building coverage and contents (personal property) coverage requested or in the event a rating error has been innocently made by you or your agent on the application, renewal, endorsement, or other form (whether evident or not) resulting in insufficient premium being received by us for the purchase of the amounts of coverage requested, then:

(i) if the insufficient premium or other rating error is discovered by us prior to a loss under the policy, the policy shall be deemed to provide only such coverage as can be purchased, for the entire term of the policy, for the amount of premium received; provided, you may increase any reduced coverage(s) at any time by payment of the correct premium for the additional limits of coverage requested and any such correct premium received by us prior to any loss under the policy shall result in coverage being provided for the loss up to the additional amount of coverage requested by you. The application of the insufficient premium received to the provision of flood insurance coverage shall be made as follows:

a. in the event that only one kind of coverage (building coverage or contents coverage) has been requested, you shall receive the limits of

policy;

b. provided (ii) (a) above does not apply, you remit and we receive the additional premium required to purchase the limits of coverage for each kind of coverage as was initially requested by you within thirty (30) days from the date we give you written notice of additional premium due or within sixty (60) days of the loss if no notice of premium due is received by you, in which case, the policy shall be reformed from its inception date to provide flood insurance coverage to you in the amounts of coverage initially requested. Silence or other failure to remit the additional premium required or non-receipt of such premium by us within thirty (30) days from the date of notice of premium due or within sixty (60) days of the loss, whichever is sooner, shall be deemed to be refusal to pay the additional premium due and any subsequent payment of the additional premium due shall not reform the policy from its inception date but shall only add the additional amounts of coverage to the policy for the remainder of its term, pursuant to 44 CFR 61.11, with any excess of premium paid being returned to you. Provided, however, under this subsection "b" as to any mortgagee (or trustee) named in the policy, we shall give a notice of additional premium due and the right of reformation shall continue in force for the benefit only of the mortgagee (or trustee), up to the amount of your indebtedness, for thirty (30) days after written notice to the mortgagee (or trustee).

G. **Policy Renewal:** The term of this policy commences on its inception date and ends on its expiration date, as shown on the "Declaration Page" which is attached to the policy. We are under no obligation to send you any renewal notice or other notice that your policy term is coming to an end and the receipt of any such notice by you shall not be deemed to be a waiver of this provision on our part. We are under no obligation to assure that policy changes reflected in endorsements submitted by you during the policy term and accepted by us are included in any renewal notice or new policy which we send to you. "Policy changes" includes the addition by you of new coverage (e.g. contents coverage added to a building coverage policy or vice versa) or any increases in the amounts of coverage.

This policy shall not be renewed and the coverage provided by it shall not continue into any successive policy term unless the premium payment for any successive policy term is received by us at the National Flood Insurance Program (NFIP), prior to the expiration date of this policy, subject to Article VIII (F.), above. The renewal premium payment shall be deemed to be received by the NFIP if the renewal payment is mailed to the NFIP prior to the expiration date and is received by the NFIP prior to or within five (5) days following the expiration date or if the renewal payment is mailed by certified mail to the NFIP prior to the expiration date. In all other cases, whether the renewal premium payment is received by the NFIP after the expiration

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surance in effect at the time of a loss we will not pay a greater portion of any loss than the proportion that our building and personal property (contents) insurance bears to the total flood insurance covering the dwelling and personal property.

D. Amendments, Waivers, Assignment: This Standard Flood Insurance Policy cannot be amended nor can any of its provisions be waived without the express written consent of the Federal Insurance Administrator. No action we take under the terms of this policy can constitute a waiver of any of our rights. Except in the case of (1) a contents only policy and (2) a policy issued to cover a building in the course of construction, assignment of this policy, in writing, is allowed upon transfer of title without the consent of the Administrator.

E. Cancellation of Policy By You:

1. You can cancel this policy at any time but a refund of premium money will only be made to you when:

a. You cancel because you have transferred ownership of the insured property to someone else. In this case, we will refund to you, once we receive your written request for cancellation (signed by you), the excess of premiums paid by you which apply to the unused portion of the policy's term, pro-rata but with retention of the expense constant.

b. You cancel because we have determined that your property is not, in fact, in a special flood hazard area; and you were required to purchase flood insurance coverage by a private lender or Federal agency pursuant to P.L. 93-234, §102; and the lender or Federal agency no longer requires the retention by you of the coverage. In this event, if no claims have been paid or are pending, your premium payments will be refunded to you in full, according to our applicable regulations, but with retention of the expense constant.

F. Voidance, Reduction or Reformation of the Coverage By Us:

1. **Voidance:** This policy shall be void and of no legal force and effect in the event that any one of the following conditions occurs:

a. The property listed on the application is not eligible for coverage, in which case the policy is void from its inception;

b. The community in which the property is located was not participating in the National Flood Insurance Program on the policy's inception date and did not qualify as a participating community during the policy's term and before the occurrence of any loss for which you may receive compensation under the policy, in which case the policy is void from its inception;

2. **Reduction or Reformation:** (i) If you request coverage in an amount greater than the amount you are entitled to purchase under the Act, we will provide coverage in the amount you are entitled to purchase and that kind of coverage which can be purchased for the amount of premium received as the expense constant.

b. In the event you have both building coverage and contents coverage have been requested, we shall determine the percentage ratio that each kind of insurance bears to the total amount of coverage requested, apportion the total premium received by the percentage ratio for each kind of coverage, and you shall receive, as to each kind of coverage requested, the amount of coverage which can be purchased by the premium amount as apportioned for each kind of coverage; where both building and contents coverage are requested and where the application of the above percentage ratio causes the premium received, as apportioned by the ratio, to produce an amount of premium for one of the kinds of coverage to be more than sufficient to purchase the amount of insurance of that kind of coverage requested by you, any such excess of apportioned premium will be applied to obtain an additional amount of the other kind of coverage until the amount of insurance requested for the other coverage is obtained;

c. provided, however, under this subsection (2.) (i) as to any mortgagee (or trustee) named in the policy, we shall give a notice of additional premium due and the right of reformation shall continue in force for the benefit only of the mortgagee (or trustee), up to the amount of your indebtedness, for thirty (30) days after written notice to the mortgagee (or trustee).

(ii) if the insufficient premium or other rating error is discovered by us at the time of a loss under the policy, the policy shall be deemed to provide coverage pursuant to the provisions of (i), above, unless:

a. you or your agent has sworn falsely or fraudulently or willfully concealed or misrepresented any material fact (including facts relevant to the rating of this policy) in the application for coverage, or upon any renewal of coverage, or in connection with the submission of any claim brought under this policy, in which case this entire policy shall be void as of the date the wrongful act was committed or from its inception if this policy is a renewal policy and the wrongful act occurred in connection with an application for or renewal or endorsement of a policy issued to you in a prior year and affects the rating of or premium amount received for this policy.

Refunds of premiums, if any, shall be subject to offsets for our administrative expenses (including the payment of agent's commissions for any voided policy year), in connection with the issuance of the

date of this policy or not, this policy shall be deemed terminated as of the expiration date of the last policy term for which the premium payment was timely received by the NFIP and, in that event, we shall not be obligated to provide you with any cancellation, termination, policy lapse, or policy renewal notice advising you of any such cancellation, termination, policy lapse or policy renewal; provided, however, with respect to any mortgagee (or trustee) named in the declarations form attached to this policy, this insurance shall continue in force only for the benefit of such mortgagee (or trustee) for 30 days after written notice to the mortgagee (or trustee) of termination of this policy, and shall then terminate.

In connection with the renewal of this policy, you will be requested during the policy term to recertify, on a Recertification Questionnaire we will provide you, the rating information used to rate your most recent application for or renewal of insurance.

Notwithstanding your responsibility to submit the appropriate renewal premium in sufficient time to permit its receipt by us prior to the expiration of the policy being renewed, we have established a business procedure for mailing renewal notices to assist insureds in meeting their responsibility. Regarding our business procedure, evidence of the placing of any such notices into the U.S. Postal Service, addressed to you at the address appearing on your most recent application or other appropriate form (received by the NFIP prior to the mailing of the renewal notice by us), does, in all respects, for purposes of the NFIP presumptively establish delivery to you for all purposes irrespective of whether you actually received the notice. However, in the event we determine that, through any circumstances, any renewal notice was not placed into the U.S. Postal Service, or, if placed, was prepared or addressed in a manner which we determine could preclude the likelihood of it being actually and timely received by you prior to the due date for the renewal premium, the following procedures shall be followed:

In the event that you or your agent notifies us not later than one year after the date on which the payment of the renewal was due, of a non-receipt of a renewal notice prior to the due date for the renewal premium, which we determine was attributable to the above circumstances, we shall mail a second bill providing a revised due date, which shall be thirty days after the date on which the bill is mailed. If the renewal payment is received by such revised due date, the policy shall be renewed as of the date on which the prior policy would have expired. If the renewal payment requested by reason of the second bill is not received by the revised due date, no renewal shall occur and the policy shall remain an expired policy as of the expiration date prescribed on the policy.

H. Alterations and Repairs: You may, at any time, make alterations, additions and repairs to the insured property and complete structures in the course of construction. Consistent with your obligation to protect insured property damaged by a flood from further damage, as set forth in "I", below, you may also—following a loss by flood—make reasonable repairs of a temporary or permanent nature to protect the damaged, insured property from further damage and, to the extent you keep an accurate record of such repair expenditures, the cost of any such repairs—including the value of your own labor at prevailing Federal minimum wage rates—shall be included in determining the amount of loss covered by this policy.

I. Requirements in Case of Loss: Should a flood loss occur to your insured property, you must:

1. Notify us in writing as soon as practicable;
2. Protect the property from further damage;
3. As soon as reasonably possible, separate the damaged and undamaged property, putting it in the best possible order so that we may examine it;
4. Within 60 days after the loss, send us a proof of loss, which is your statement as to the amount you are claiming under the policy, signed and sworn to by you and furnishing us with the following information:

a. The date and time of the loss,

b. A brief explanation of how the loss happened,

c. Your interest in the property damaged (for example, "owner") and the interests, if any, of others in the damaged property.

d. The actual cash value of each damaged item of insured property after depreciation is deducted from the cost of replacement of the property (unless the policy's "REPLACEMENT COST PROVISIONS" apply, in which case the replacement cost without allowance for depreciation should be furnished) and the amount of damages sustained,

e. Names of mortgagees or anyone else having a lien, charge or claim against the insured property,

f. Details as to any other contracts of insurance covering the property, whether valid or not.

g. Details of any changes in ownership, use, occupancy, location or possession of the insured property since the policy was issued,

h. Details as to who occupied any insured building at the time of loss and for what purpose, and

i. The amount you claim is due under this policy to cover the loss, including statements concerning:

(i) The limits of coverage stated in the policy.

(ii) The cost to repair or replace the damaged property (whatever costs less).

The insurance adjuster whom we hire to investigate your claim may furnish you with a proof of loss form, and she or he may help you to complete it. However, this is a matter of courtesy only, and you must still send us a proof of loss within 60 days after the loss even if the adjuster does not furnish the form or help you complete it. In completing the proof of loss, you must use your own judgment concerning the amount of loss and the justification for that amount; the adjuster is not authorized to approve or disapprove claims or to tell you whether your claim will be approved by us.

5. We may, at our option, waive the requirement for the completion and filing of a Proof of Loss in certain cases, in which event you will be required to sign and, at our option, swear to an adjuster's report of the loss which includes information about your loss and the damages needed by us in order to adjust your claim;

6. Any false statements made in the course of presentment of a claim under this policy may be punishable by fine or imprisonment under the applicable Federal Laws.

J. Our Options After a Loss: Options we may, in our sole discretion, exercise after loss include the following:

1. **Evidence of Loss:** If we specifically request it, in writing, you may be required to furnish us with a complete inventory of the destroyed, damaged and undamaged property, including details as to quantities, costs, actual cash values, amounts of loss claims, and any written plans and specifications for repair of the damaged property which you can make reasonably available to us.

2. **Examination Under Oath:** We may require you to show us or our designee, the damaged property, to be examined under oath by our designee and to sign any transcripts of such examinations; to, at such reasonable times and places as we may designate, permit us to examine and make extracts and copies of all books of accounts, bills, invoices and other vouchers, or certified copies thereof if the originals are lost, pertaining to the damaged property.

3. **Options to Repair or Replace:** We may take all or any part of the damaged property at the agreed or appraised value and, also, to repair, rebuild or replace the property destroyed or damaged with other of like kind and quality within a reasonable time, on giving you notice of our intention to do so within 30 days after receipt of the proof of loss herein required under "I", above.

4. **Adjustment Options:** We may adjust loss to any insured property of others with the owners of such property or with you for their account. Any such insurance under this policy shall not inure directly or indirectly to the benefit of any carrier or other bailee for hire.

K. When Loss Payable: Loss is payable within 60 days after you file your proof of loss (or within 90 days after the insurance adjuster files an adjuster's report signed and sworn to by you in lieu of a proof of loss) and ascertainment of the loss is made either by agreement between us and you expressed in writing or by the filing with us of an award as provided in paragraph "M", below. If we reject your proof of loss in whole or in part, you may accept such denial of your claim, or exercise your rights under this policy, or file an amended proof of loss as long as it is filed within 60 days of the date of the loss or any extension of time allowed by the Administrator.

L. Abandonment: You may not abandon damaged or undamaged insured property to us.

However, we may permit you to keep damaged, insured property ("salvage") after a loss and reduce the amount of the loss proceeds payable to you under the policy by the value of the salvage.

M. Appraisal: If at any time after a loss, we are unable to agree with you as to the actual cash value—or, if applicable, replacement cost—of the damaged property so as to determine the amount of loss to be paid to you, then, on the written demand of either one of us, each of us shall select a competent and disinterested appraiser and notify the other of the appraiser selected within 20 days of such demand. The appraisers shall first select a competent and disinterested umpire; and failing, after 15 days, to agree upon such umpire, then, on your request or our request, such umpire shall be selected by a judge of a court of record in the State in which insured property is located. The appraisers shall then appraise the loss, stating separately replacement cost, actual cash value and loss to each item; and, failing to agree, shall submit their differences, only, to the umpire. An award in writing, so itemized, of any two (appraisers or appraiser and umpire) when filed with us shall determine the amount of actual cash value and loss or, should this policy's replacement cost provisions apply, the amount of replacement cost and loss. Each appraiser shall be paid by the party selecting him and the expenses of appraisal and umpire shall be paid by both of us equally.

N. Loss Clause: If we pay you for damage to property sustained in a flood loss, you are still eligible, during the term of the policy, to collect for a subsequent loss due to another flood. Of course, all loss arising out of a single, continuous flood of long duration shall be adjusted as one flood loss.

O. Mortgage Clause: (Applicable to building items only and effective only when policy is m[illegible]ayable to a mortgagee (or trustee) named in the application an[illegible]claration form attached to this policy or of whom the Insurer has actual notice prior to the payment of loss proceeds under this policy).

Loss, if any, under this policy, shall be payable to the aforesaid as mortgagee (or trustee) as interest may appear under all present or future mortgages upon the property described in which the aforesaid may have an interest as mortgagee (or trustee), in order of precedence of said mortgages, and this insurance as to the interest of the mortgagee (or trustee) only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the described property, nor by any foreclosure or other proceedings or notice of sale relating to the property, nor by any change in the title or ownership of the property, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy; provided, that in case the mortgagor or owner shall neglect to pay any premium due under this policy, the mortgagee (or trustee) shall, on demand, pay the same.

Provided, also, that the mortgagee (or trustee) shall notify the Insurer of any change of ownership or occupancy or increase of hazard which shall come to the knowledge of said mortgagee (or trustee) and, unless permitted by this policy, it shall be noted thereon and the mortgagee (or trustee) shall, on demand, pay the premium for such increased hazard for the term of the use thereof; otherwise this policy shall be null and void.

If this policy is cancelled by the Insurer, it shall continue in force for the benefit only of the mortgagee (or trustee) for 30 days after written notice to the mortgagee (or trustee) of such cancellation and shall then cease, and the Insurer shall have the right, on like notice, to cancel this agreement.

Whenever the Insurer shall pay the mortgagee (or trustee) any sum for loss under this policy and shall claim that, as to the mortgagor or owner, no liability therefor existed, the Insurer shall, to the extent of such payment, be thereupon legally subrogated to all the rights of the party to whom such payment shall be made, under all securities held as collateral to the mortgage debt, or may, as its option, pay to the mortgagee (or trustee) the whole principal due or to grow due on the mortgage with interest, and shall thereupon receive a full assignment and transfer of the mortgage and of all such other securities; but no subrogation shall impair the right of the mortgagee (or trustee) to recover the full am[illegible]nt of said mortgagee's (or trustee's) claim.

P. Mortgagee[illegible]gations: If the insured fails to render proof of loss, the named mortgagee (or trustee) upon notice, shall render proof of loss in the form herein specified within 60 days thereafter and shall be subject to the provisions of this policy relating to appraisal and time of payment and of bringing suit.

Q. Conditions for filing a lawsuit: You may not sue us to recover money under this policy unless you have complied with all the requirements of the policy. If you do sue, you must start the suit within twelve (12) months from the date we mailed you notice that we have denied your claim, or part of your claim, and you must file the suit in the United States District Court for the district in which the insured property was located at the time of the loss.

R. Subrogation: Whenever we make a payment for a loss under this policy, we are subrogated to your right to recover for that loss from any other person. That means that your right to recover for a loss that was partly or totally caused by someone else is automatically transferred to us, to the extent that we have paid you for the loss. We may require you to acknowledge this transfer in writing. After the loss, you may not give up our right to recover this money or do anything which would prevent us from recovering it. If you make any claim against any person who caused your loss and recover any money, you must pay us back first before you may keep any of that money.

ARTICLE IX—LIBERALIZATION CLAUSE

While this policy is in force, should we have adopted any forms, endorsements, rules or regulations by which this policy could be broadened or extended for your benefit by endorsement or substitution of policy form, then, such matters shall be considered to be incorporated in this policy without additional premium charge and shall inure to your benefit as though such endorsement or substitution of policy form had been made.

ARTICLE X—WHAT LAW GOVERNS

This policy is governed by the flood insurance regulations issued by FEMA, the National Flood Insurance Act of 1968, as amended (42 U.S.C. §4001, et seq.) and Federal common law.

IN WITNESS WHEREOF, we have signed this policy below and hereby enter into this Insurance Agreement.

JEFFREY S. BRAGG
Administrator
Federal Insurance Administration

PROCEDURES IN CASE OF A FLOOD

For the protection of you and your family, the following tips are suggested as guidelines by the National Flood Insurance Program. If you are ever in doubt as to what action is needed, consult local disaster officials or call toll-free: (800) 638-6620.

Know your agent's name and phone number. List them here for fast reference:

Agent _____ Phone Number _____

- Protect the flood property—both building and contents—from further damage, if at all possible;
- Please notify your insurance agent as soon as possible after the flood;
- Remind your agent to assign the claim to an approved NFIP claims adjuster;
- Determine the claims adjuster assigned to your claim and contact him if you have not been contacted within 24 hours after you reported the claim to your insurance agent;
- As soon as possible separate the damaged property from undamaged property and store all property so it can be inspected and evaluated;
- Discuss with the adjuster any need you may have for an advance or partial payment of your loss.
- In order to help the claims adjuster, try to take pictures of the outside of the premises showing the flooding and the damage and similar pictures of the inside of the premises showing the height of the water and the damaged property;
- Place all books, records, receipts and any other loss verification material in a safe place for examination and evaluation by the claims adjuster;
- Work cooperatively and promptly with the claims adjuster to determine and document all claim items. Be prepared to advise the claims adjuster of the cause and responsible party(ies), if flood was caused by other than natural cause;
- Make certain the claims adjuster fully explains all allowances and procedures for processing claim payments, based on your Proof of Loss which the policy requires you to send us within 60 days of the loss; and
- Any and all coverage problems and claim allowance restrictions must be communicated directly from the NFIP—claims adjusters have no authority to approve or deny claims and only report to the NFIP on the elements of flood cause and damage.

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NOTICE: The terms of the enclosed Standard Flood Insurance Policy were amended, effective October 1, 1983. Since the new policy represents the coverage provided to you by the National Flood Insurance Program, the following coverage limitations and policy provisions are being brought to your attention.

I. New and renewal policies do not cover flood damage to:

(1) finished walls, floors, ceilings or other similar construction or improvements to a basement area;

(2) enclosures and building components located below (at a lower elevation or level) the lowest elevated floor of an elevated building (except for the required utility connections and the footing, foundation, posts, pilings, piers or other foundation walls and anchorage system as required for the support of the elevated building);

(3) contents, building machinery and equipment located in a basement area or below the lowest elevated floor of an elevated building (except for stairways and staircases attached to the building and not separated from an elevated building by elevated walkways); and coverage is provided for sump pumps, well-water tanks, oil tanks, furnaces, hot water heaters, clothes washers and dryers, food freezers, air conditioners, heat pumps and electrical junction and circuit breaker boxes.

II. In addition to the basic deductible of $500 for each loss to building and contents and the $3,000 deductible also currently available for properties located in coastal high hazard areas—Zones V and V1 to V30, optional deductibles up to $5,000 will be available commencing April 1, 1984 in all zones and a policy may be endorsed for a deductible higher than the basic $500 or V-Zone optional $3,000 deductible on or after April 1, 1984. The higher deductibles will provide a means for insureds who are primarily concerned with protection for a major catastrophe to reduce their flood insurance premiums.

III. The policy provides for a recertification of the rating information used to rate the most recent application or renewal. This will be accomplished by the mailing of a recertification questionnaire to insureds where there may be some question concerning the accuracy of the rating information or where the rating information has not been recently up-dated.

Insurance coverage and premium are based on the description of the property contained on your current insurance policy. Review the computer printed Policy Declaration page to make sure the information is correct. Your insurance protection can be jeopardized if you have made alterations or substantial improvements to your building which are not reflected on the policy and which are in violation of your community's flood plain management ordinances. This includes such modifications as changing an unfinished basement into a totally or partially finished basement with more than twenty linear feet of finished walls or equipping it for use as a kitchen or habitable or business area, or enclosing an area beneath the lowest floor of an elevated building. (See Article VIII, Section F of Dwelling Form; Section E of General Property Form.)

Contact your insurance agent about any changes so that the appropriate endorsement can be submitted to protect your insurance coverage. If you have any questions about the new policy changes, please see your local insurance agent.

The Flood Insurance Program is a Federal Program. Willful misrepresentation of information by the insurance applicant or insurance agent is a criminal offense punished by imprisonment, fine or both.

Appendix D-1

NATIONAL FLOOD INSURANCE PROOF M

September 15, 1986

Donald L. Holeman
POB 563
Wichita Falls, TX 76307-0563

RE: Policy #: 2-0148-2256-9, 2-0168-2206-2 & 2-0168-2207-0
D/Loss : 6-10-86

Dear Insured:

We have previously advised you of the policy requirements, plus we gave you an additional 10 days to comply. We also previously advised you that if your Proof of Loss was not received in the additional 10 day period, that we would have no alternative but to close our file.

In addition to the above we previously requested receipts to support the above claims since there were prior losses, and payments involved. This letter is to inform you that since you did not comply with the above, we have now closed our file for your refusal to cooperate and failure to pursue.

Under the provisions of the Standard Flood Insurance Policy, you have one year from the date of this denial within which to file suit in the U.S. District Court for the district in which the insured property was located at the time of loss.

Please be advised that this office waives no policy provision other than as outlined above and reserves all rights under the above referenced policy.

Very truly yours,

D.L. Marks
Claims Examiner

B.J. Hill
Sr. Claims Examiner

DLM/BJH/rdm

cc: William E. Love
c/o Bill Lane Ins.
POB 4432 3506 McNiel
Wichita Falls, TX 76308

GAB
POB 4806
Wichita Falls, TX 76308